

ARLENE A. ATWOOD
Claimant

CITY OF WICHITA

Respondent
Self-Insured

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 192,202

On October 9, 1996, the application of respondent and the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of the Award entered by Administrative Law Judge Shannon S. Krysl on May 2, 1996, came on for oral argument in Wichita, Kansas.

Claimant appeared by and through her attorney, Martin E. Updegraff of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, David J. Morgan of Wichita, Kansas, and is currently represented by Edward D. Heath, Jr., of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Paul V. Dugan, Jr., of Wichita, Kansas. There were no other appearances.

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

Both the respondent and the Fund raised the following issues:

- (1) The compensability of claimant's alleged injury to her left upper extremity, with both respondent and the Fund denying claimant suffered accidental injury arising out of and in the course of her employment.
- (2) The nature and extent of claimant's injury and/or disability.

The Kansas Workers Compensation Fund raises the following issue:

- (1) The liability of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant is a 50-year-old high school graduate who worked as a custodial worker for the Wichita Airport Authority. Her job included vacuuming, cleaning restrooms, washing windows, sweeping streets, buffing, shampooing, emptying trash, and other general maintenance duties. On October 31, 1993, while attempting to start a street blower, claimant jerked her right hand and wrist and immediately felt a sudden onset of pain. Claimant notified her supervisor and was referred to R. Kevin Bryant, M.D., an occupational medicine specialist. Dr. Bryant provided conservative treatment to claimant including a sling and returned claimant to work with the restriction that she not use her right upper extremity. Claimant continued working using only her left upper extremity and began experiencing symptoms in her left upper extremity. This one-armed work continued until January 1994, at which time claimant was returned to regular duty without restriction. Claimant continued doing her regular job without restriction until May 9, 1994. At that time, while pulling on a large vacuum, claimant reinjured her right arm. Claimant was again referred to Dr. Bryant on May 16, 1994, at which time he again restricted the use of claimant's right upper extremity. Claimant returned to work on May 17, 1994, and was informed that she would have to work outside, in the sun, cleaning up the grounds. When claimant objected, alleging a medical condition known as photosensitivity, she was advised by her supervisors that this was her light-duty assignment. Claimant elected to terminate her employment rather than suffer the consequences of working in the sunlight. No medical evidence was placed into the record regarding this medical condition.

Claimant alleges two accidental injuries to her right upper extremity, the first being October 31, 1993, the second being May 9, 1994. Claimant also alleges a series of microtraumas to her left upper extremity while protecting the right upper extremity. Respondent and the Kansas Workers Compensation Fund object, alleging claimant did not prove injury to her left upper extremity, and argue the award should be limited to a scheduled injury to the right upper extremity. Claimant, on the other hand, contends she is entitled to a whole body disability including a work disability for the bilateral upper extremity injuries.

The Appeals Board will first consider whether claimant suffered accidental injury to her left upper extremity arising out of and in the course of her employment. Claimant contends that she overused her left upper extremity while working with one arm only while

under the restrictions of Dr. Bryant. The restrictions prohibited her from using the right hand.

Personal injury or injuries resulting from accidents can occur in a single event or from a series of events which occur over time. The event or events do not have to be traumatic or manifested by force. Rather, an accident can occur when, as a result of performing the usual tasks in their usual manner, an employee suffers an injury. Downes v. IBP, Inc., 10 Kan. App. 2d 39, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 857 (1985).

Claimant is the only witness who testified regarding the aggravation to her left upper extremity and clearly describes a series of injuries to her left upper extremity occurring while she was not using her right upper extremity. Respondent contends that claimant's failure to seek medical treatment for this left upper extremity condition until after her termination with the City is evidence that claimant did not suffer an accidental injury to the left upper extremity. The Appeals Board rejects this contention. The Appeals Board notes that clinical records dated May 20, 1994, through June 22, 1994, indicate treatment to the left upper extremity while claimant was being treated by Dr. Durand. Claimant's testimony regarding the onset of symptoms is uncontradicted. While her reluctance to seek treatment does raise some question, the Appeals Board finds that her testimony is not improbable or unreasonable and will not be disregarded as it has not been shown to be untrustworthy. See Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146(1976).

Both respondent and the Kansas Workers Compensation Fund have stipulated to the fact that claimant suffered accidental injury to her right upper extremity on the two specific occasions. The Appeals Board must, however, consider the nature and extent of the injury suffered by claimant to the right upper extremity. The Appeals Board finds, based upon the stipulation of the parties that claimant did suffer specific trauma to her right upper extremity on both October 31, 1993, and on May 9, 1994. Claimant was returned to work subsequent to these injuries with restrictions. The restrictions on October 1993 prohibited any use of the right upper extremity. The restrictions in May 1994 restricted forceful or repetitive use of the right upper extremity. However, due to the conflict regarding the offered light duty, claimant was unable to return to work subsequent to her May 1994 injury and instead, terminated her employment on May 17, 1994.

Both Stephen T. Sparks, M.D., and Blake C. Veenis, M.D., testified to claimant's ongoing symptomatology and complaints. Dr. Veenis, a physical medicine and rehabilitation specialist, first saw claimant in January 1994, as a referral from Dr. Bryant. He continued providing treatment for claimant through June 1995 at which time he placed specific restrictions upon her and assessed her a 6 percent right upper extremity impairment which converts to a 4 percent whole person functional impairment. He also assessed a 4 percent functional impairment to the left upper extremity which converts to a 2 percent whole person impairment. Dr. Veenis felt that claimant's right upper extremity symptomatology stemmed entirely from the October 1993 incident, with the May 1994 incident being a temporary exacerbation only.

Dr. Sparks first examined claimant in November 1994. He was provided the working notes from Dr. Veenis, Dr. Paste, Dr. Williams, and Dr. Durand. He noted the upper extremity nerve conduction studies done as late as July 1994 by Dr. Veenis were showing normal values for the right side. There were no tests performed on the left side at that time. While he found some symptomatology in claimant's upper extremities, he also found a good deal of symptom magnification by claimant. In following the AMA Guides, he assessed claimant a 5 percent right upper extremity functional impairment which converts to a 3 percent whole person impairment. He also assessed a 3 percent left upper extremity functional impairment which converts to a 2 percent whole person impairment. He also placed specific restrictions upon claimant's use of her upper extremities.

Claimant alleges the injuries to her right upper extremity when combined with the microtrauma injuries to her left upper extremity constitute a whole body impairment. Respondent on the other hand argues claimant should be restricted to the functional impairments to the upper extremities and no work disability. When dealing with bilateral extremity trauma, Kansas has a long case law history. The Supreme Court in Honn v. Elliott, 132 Kan. 454, 295 Pac. 719 (1931) held that when a worker suffers partial disability in both feet, the compensation should not be computed for each foot separately, but rather under the statute providing for the compensable injury for both feet. Thus, under Honn, when both hands, arms, feet, or legs are partially disabled, the disability is no longer a scheduled injury under K.S.A. 44-510d but instead is classified as a permanent partial general disability to the body as a whole under K.S.A. 44-510e.

This philosophy continued through Downes, *supra*, and Murphy v. IBP, Inc., 240 Kan. 141, 727 P.2d 468 (1986). In Murphy the claimant alleged problems to both upper extremities. Initially the problems were in the right hand, wrist and shoulder but, as these problems worsened, she began having difficulties in her left hand as well. A significant difference between Murphy and the case before the Appeals Board is that in Murphy both upper extremities resulted from microtrauma injuries with simultaneous aggravation of the condition.

Here we have specific traumas to claimant's right upper extremity on October 31, 1993, and again on May 9, 1994. In between the specific trauma injuries claimant alleges, and it has been found, that claimant suffered microtrauma aggravations to the left upper extremity as a result of overcompensating to protect the right. It is significant that claimant's left upper extremity symptomatology began and worsened at a time when claimant was restricted medically from any use of the right upper extremity. In fact, when she was returned to work in October 1993, claimant's right upper extremity was placed in a sling.

While claimant argues simultaneous aggravation of her upper extremities the medical evidence indicates two specific injuries to the right upper extremity with an aggravation to the left upper extremity interposed in between. The medical evidence also supports a finding that the May 1994 injury to the right upper extremity was a temporary aggravation only.

In Murphy, the Supreme Court found claimant's hands and arms were simultaneously aggravated, resulting in work-related injuries to both hands and arms and allowing for a disability to the body as a whole under K.S.A. 44-510e. The Appeals Board here finds claimant has suffered separate injuries to both her right and left upper extremities without simultaneous aggravation during her employment with respondent. As such, this matter is controlled by the scheduled injury section under K.S.A. 44-510d which allows for separate scheduled awards for both the right and the left upper extremity injuries. In considering the medical evidence of Dr. Sparks and Dr. Veenis the Appeals Board finds claimant has suffered a 5.5 percent functional impairment to the right upper extremity as a result of the injury occurring on October 31, 1993. Claimant has also suffered a 3.5 percent functional impairment to the left upper extremity as a result of the injuries from November 1, 1993, through her return to work in January 1994. While claimant contends continued aggravation thereafter, claimant's testimony supports a finding that her left upper extremity injuries occurred as a result of the overcompensation while her right arm was in a sling. In failing to find a simultaneous aggravation here, as was the case in Murphy, supra, the Appeals Board finds claimant is entitled to two functional impairments, one to the right upper extremity and one to the left upper extremity, under K.S.A. 44-510d.

The Appeals Board must next consider the liability of the Kansas Workers Compensation Fund.

K.S.A. 44-567 provides circumstances when an employer who knowingly employs or retains a handicapped employee who subsequently suffers a compensable work related injury shall be relieved of liability for compensation awarded, with the liability assessed to the Kansas Workers Compensation Fund. The Kansas Workers Compensation Act defines "handicapped employee" as one afflicted with an impairment "of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed." See K.S.A. 44-566(b). Whether a particular impairment is of such a nature as to render the employee "handicapped" is a question of fact and the burden of proving that fact rests with the party claiming the handicap. Hinton v. S. S. Kresge Co., 3 Kan. App. 2d 29, 592 P.2d 471 (1978), *rev. denied* 225 Kan. 844 (1979).

To be relieved of liability, an employer must prove either it had knowledge of the preexisting impairment at the time it employed the individual or that the employer retained the individual as an employee after acquiring knowledge of the preexisting impairment. K.S.A. 44-567(b). An employer shall find relief from liability whenever a handicapped employee is injured or disabled and the Director finds that the injury would not have occurred "but for" the preexisting physical or mental impairment. K.S.A. 44-567(a)(1). In resolving the issue of Fund liability in this matter the Appeals Board must first look to the evidence presented by claimant. There is no indication either medically or from claimant's testimony that claimant had a preexisting handicap to her right upper extremity prior to the October 31, 1993, injury. As there is no evidence to support a finding that claimant was handicapped prior to that time, no Fund liability for the right upper extremity can be assessed.

However, with regard to the left upper extremity claimant testified that, after suffering a specific trauma to her right upper extremity and being restricted from the use of that right upper extremity, she overcompensated and developed problems with the left upper extremity. Both Dr. Sparks and Dr. Veenis testified that “but for” the injury to the right upper extremity the problems on the left would not have occurred.

The Appeals Board finds that subsequent to the injury of October 31, 1993, claimant was a handicapped employee as defined by K.S.A. 44-566 and respondent had knowledge of that handicap. The Appeals Board further finds that “but for” the right upper extremity injuries, claimant would not have suffered the left upper extremity injuries. Therefore, the Appeals Board finds the Kansas Workers Compensation Fund shall be liable for all medical treatment and any award assessed for the left upper extremity injuries.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Shannon S. Krysl dated May 2, 1996, should be, and is hereby, modified and an award of compensation is hereby made in accordance with the above findings in favor of the claimant, Arlene A. Atwood, and against the respondent, City of Wichita, a qualified self-insured, and the Kansas Workers Compensation Fund for accidental injuries sustained on October 31, 1993, and May 9, 1994, to claimant’s right upper extremity and for a series of accidental injuries sustained from November 1, 1993, through claimant’s return to work in January 1994 to claimant’s left upper extremity.

Claimant is entitled to 1.86 weeks temporary total disability compensation at the rate of \$313 per week totaling \$582.18 followed thereafter by 11.45 weeks permanent partial disability at the rate of \$313 per week for a total of \$3,583.85 for claimant’s 5.5% functional impairment to the right upper extremity all of which is the liability of the respondent. Claimant is further entitled to 7.35 weeks permanent partial disability on a functional basis at the rate of \$313 per week totaling \$2,300.55 for a 3.5% functional impairment to the left upper extremity all of which is the responsibility of the Kansas Workers Compensation Fund. The Kansas Workers Compensation Fund is further ordered to reimburse respondent for 100% of all medical treatment and costs associated with the injury to claimant’s left upper extremity.

As of June 10, 1997, there would be due and owing to claimant the entire award in one lump sum minus amounts previously paid.

Claimant is further entitled to unauthorized medical up to statutory maximum upon presentation of an itemized statement verifying same.

Future medical will be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and the Workers Compensation Fund to be paid 50% each as follows:

Barber & Associates	
Transcript of preliminary hearing	\$273.40
Don K. Smith & Associates	
Deposition of Jerry D. Hardin	\$281.50
Deposition of Blake C. Veenis, M.D.	496.20
Ireland Court Reporting	
Transcript of regular hearing	\$346.50
Kelley, York and Associates, Ltd.	
Deposition of Karen Terrill	\$258.60
Deposition of Mitchel A. Woltersdorf, Ph.D.	Unknown
Deposition of Stephen T. Sparks, M.D.	417.87

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Martin E. Updegraff, Wichita, KS
David J. Morgan, Wichita, KS
Paul V. Dugan, Jr., Wichita, KS
Office of Administrative Law Judge, Wichita, KS
Philip S. Harness, Director